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No. 07-1216

IN THE SUPREME COURT OF THE UNITED STATES

PHILIP MORRIS USA,
*Petitioner,*

v.

MAYOLA WILLIAMS,
*Respondent.*

On Petition For A Writ Of Certiorari To
The Supreme Court Of Oregon

# BRIEF OF ASSOCIATED OREGON INDUSTRIES, NORTHWEST GROCERY ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, OREGONIANS FOR FOOD & SHELTER, OREGON METALS INDUSTRIES COUNCIL, AND OREGON RESTAURANT ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

The Oregon *amici* address the following question: Whether, after this Court has adjudicated the merits of a party's federal constitutional claim and remanded the case to the state court with instructions to "apply" the correct constitutional standard, the state court may instead hold the federal claim forfeited by interposing a state-law procedural rule in a way that serves no legitimate state interest and is neither firmly established nor regularly followed.

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# BRIEF OF ASSOCIATED OREGON INDUSTRIES, NORTHWEST GROCERY ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, OREGONIANS FOR FOOD & SHELTER, OREGON METALS INDUSTRIES COUNCIL, AND OREGON RESTAURANT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

## I. INTRODUCTION

### A. Statement of Interest of *Amici Curiae* [1]

Associated Oregon Industries (AOI) is a nonprofit, statewide business and lobbying organization representing more than 1600 members, employing approximately 200,000 people. Members include manufacturing, retail, agriculture, technology, healthcare, and construction companies located throughout Oregon.

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[1] Pursuant to Rule 37, these *amici* state: (1) all parties have consented to this brief; (2) notice of intent to file this brief was given to plaintiff within the time required by Rule 37; (3) no counsel for any party has authored this brief; and (4) no party or entity, other than the Oregon *amici,* their members or their counsel, has made any monetary contribution to the preparation or submission of this brief.

The Northwest Grocery Association (NWGA) is a nonprofit association representing the retailers, wholesalers, brokers, manufacturers and suppliers that support the Oregon's grocery industry.

Oregonians for Food & Shelter (OFS) is a non-profit coalition of natural resource based businesses in Oregon. It includes over 13,000 individuals and businesses.

The Oregon Forest Industries Council (OFIC) represents Oregon's forest products industry. The industry employs over 85,000 people statewide.

The Oregon Metals Industries Council (OMIC) represents the interests of Oregon metal manufacturers. Its members employ over 60,000 people in Oregon.

The Oregon Restaurant Association (ORA) is the leading business association for more than 9,000 Oregon restaurant and hospitality businesses and their suppliers in the state. Its members employ a work force of more than 110,000.

AOI, NWGA, OFS, OFIC, OMIC and ORA (the Oregon *amici*) urge this Court to correct the Oregon Supreme Court's refusal to address this Court's instruction to the Oregon court that it provide Philip Morris with the protection due process required.

## B. Summary of Argument

Previously, this Court found that an instruction requested by Philip Morris would have correctly advised the jury to consider but not punish it for harm to non-parties. This Court concluded that the Due Process Clause of the Fourteenth Amendment requires such an instruction or some comparable protection. The Court remanded the case to the Oregon Supreme Court to assure Philip Morris this safeguard.

Instead of following this Court's mandate, the Oregon Supreme Court adhered to its prior decision. Although the court had addressed the merits of the federal due process question before, on remand it did not. Turning to state law, the court discovered separate portions of Defendant's Requested Jury Instruction No. 34 (Instruction No. 34) that contained unrelated misstatements about punitive damages. And with that discovery, the court invoked its procedural rule that, in order to reverse for refusal to give an instruction, the instruction must be "correct in all respects." On that basis, the court affirmed the trial court judgment without providing the constitutional protection this Court mandated be provided to Philip Morris.

The Oregon Supreme Court's latest decision does not rest upon adequate and independent state grounds. Before this case, the "correct in all respects" rule was not firmly established and regularly applied

when, as here, the trial judge declared that she would not give the "harm to non-parties" instruction, no matter how it was written and, presumably, no matter how any other paragraph of Instruction No. 34 might have been written. In fact, in 2004, the court held that the rule had no application in such circumstances. Nor has the "correct in all respects" rule been firmly established or regularly applied by the Oregon Supreme Court to affirm a verdict that is a product of a misinformed jury.

The rule as applied served no legitimate state purpose. The trial judge chose to engage counsel in an interactive exchange in which the judge constructed a composite jury instruction, line by line, from the parties' competing drafts and alternative paragraphs. Even if the "correct in all respects" rule were otherwise sound, its application here was too "exorbitant" for this Court to permit the rule to bar the federal constitutional protection the Court previously recognized. For these reasons, the Court should reiterate its instruction that the Oregon court afford Philip Morris due process.

## II. ARGUMENT

### A. This Court's Prior Decision

This Court has ruled that "[t]he Constitution's Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they

directly represent, *i.e.*, injuries that it inflicts upon those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams,* 127 S. Ct. 1057, 1063 (2007). The Court explained that, although a jury may consider harm to non-parties in evaluating the reprehensibility of a defendant's conduct, the jury may not "go further than this and use a punitive damages award to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064. This Court concluded that "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one," that "it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance, and that where the risk of jury confusion is "a significant one, * * * a court, upon request, must protect against that risk." *Id.* "Although States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Id.* at 1065 (emphasis in original).

As to Instruction No. 34, this Court observed that it "distinguishes between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." *Id.* at 1064. The Court recognized that Philip Morris had argued below that the Constitution prohibits the state from using punitive damages to punish a defendant for harm to non-

parties and that the Oregon Supreme Court had rejected that argument on its merits. *Id.* Because the wrong constitutional standard had been applied, this Court vacated the judgment and remanded "so that the Oregon Supreme Court can apply the standard we have set forth." *Id.* at 1065.

## B. The Case on Remand

On remand, the Oregon Supreme Court declined to apply the constitutional standard this Court recognized. Instead, the court adhered to its prior decision, finding errors of state law in other, unrelated sections of Instruction No. 34. *Williams v. Philip Morris USA,* 344 Or. 45, 176 P.3d 1255 (2008). The court found that the instruction contained two other statements that did not accurately reflect Oregon statutory law on punitive damages. When introducing a list of factors to consider in awarding punitive damages, the instruction would have told jurors that they "may" consider the factors, when the jurors should be told they "shall" consider the factors. At paragraph (2)(c), the instruction would have described one factor as a consideration of Philip Morris's motivation to earn "illicit profits." *Id.* at 57, 176 P.3d at 1261-62. The court concluded that, under state law, the trial court properly rejected Instruction No. 34 in its entirety, since it was not "correct in all respects." *Id.* at 61, 176 P.3d at 1263-64.

### C. The Judge's Review of Instruction No. 34

Although it missed the significance, the Oregon Supreme Court recognized the special nature of the trial judge's conference on jury instructions. The court observed:

> "The trial court analyzed the proposed jury instructions line-by-line with the parties, during which time Philip Morris argued that the consider-but-don't-punish part of proposed jury instruction No. 34 was needed to ensure that this plaintiff did not receive punitive damages that should be awarded (if they were to be awarded at all) to other plaintiffs. After the trial court had reviewed Philip Morris's proposed jury instruction No. 34 together with plaintiff's proposed jury instruction on punitive damages – the transcript of that part of the trial court's analysis is 50 pages long—the trial court declined to give proposed jury instruction No. 34 as proffered."

344 Or. at 50-51, 176 P.3d at 1258.

The court's description does not fully capture Instruction No. 34 or what happened at the instructions conference. Instruction No. 34 was comprised of different topics concerning punitive

damages. (Petition For Certiorari Appendix [Pet. App.] 159a-160a). Each topic was presented as a separate paragraph. Some concerned state law; others concerned federal constitutional law. (*Id.*) After six preliminary paragraphs, a seventh paragraph introduced a list of factors for consideration in setting the amount of punitive damages. The list was numbered. The disputed issue here appeared in a numbered factor (1), followed by an alternative paragraph (1), which together clearly indicated the severable nature of the paragraphs. (*Id.*)

The trial judge treated the paragraphs of the parties' competing instructions as severable. She worked through each paragraph and subsection of Instruction No. 34 with the parties, solicited comment, and decided whether to give each particular subsection of the instruction. (Pet. App. at 155a-162a.) In the end, the court settled on a composite instruction.

As to the "harm to non-parties" paragraph, Philip Morris argued that the instruction was required by the federal constitution. (*Id.* at 157a-158a, 162a.) The trial judge considered that argument separately, asking if there was a case "that says this element has to be there for the jury" and commenting rhetorically "why wander where no judge has been told to go before?" The judge eventually rejected that part of Instruction No. 34 on its merits, i*d.* at 161a-162a, a decision unaffected by other unrelated paragraphs of

the instruction or by the fact that various issues on punitive damages appeared under one title ("Punitive Damages – Products Liability) or under one instruction number ("Defendant's Requested Jury Instruction No. 34").

## D. No "Adequate State Ground"

### a. Still a Federal Issue

"This Court will not take up a question of federal law presented in a case "'if the decision of [the state] court rests upon a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (emphasis in original) (c*iting Coleman v. Thompson*, 501 U.S. 772, 729 (1991)); *see also Lee*, 534 U.S. at 375 (adequacy of state law ground "is itself a federal question."). To be adequate to avoid a federal question, the state rule must be a "firmly established and regularly followed state practice," and must further a legitimate state interest. *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). Even then, there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee*, 534 U.S. at 376.

In *Lee*, a bona fide rule requiring a motion to postpone to be made in writing would not stop consideration of the federal question, where the trial judge heard an oral motion to postpone and would

not have considered a written motion any differently. The state rule failed its purpose. The rule was too "exorbitant" an application to deny the federal right. *See also Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (state rule requiring contemporaneous objection to instruction served "no perceivable state interest" when defendant had urged the same point without success in a pretrial motion).

In *NAACP v. Alabama*, 377 U.S. 288 (1964), the state court invoked its procedural rule "of long standing and frequent application" that, where unrelated assignments of error are argued together, all will fail if any one is without merit. *Id.* at 295. The state court had used its rule to avoid this Court's prior decision. This Court rejoined that the brief's structure was "a mere stylistic device." The rule was satisfied in substance. Indeed, the state had not observed the rule in the same way before. "Pointless severity" would not go unnoticed. No adequate state ground prevented consideration of the federal issue. *See also Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (state procedural requirements not strictly or regularly followed cannot frustrate consideration of federal issue).

In this case, none of these federal standards are met. The Oregon high court applied the "correct in all respects" rule in a way that not only had not been firmly established or regularly followed but in a way inconsistent with the leading state case on point. The rule as applied did not serve its purpose. And,

even if the rule were sound and applied as it regularly had been, its application here was too "exorbitant" to frustrate consideration of a principle of due process assured by the Fourteenth Amendment.

### b. Belated Discovery of State Rules

Nearly 30 years ago, Oregon's appellate courts formally adopted a "first things first" analytical priority when resolving cases, first deciding statutory or common law issues before reaching constitutional issues, and then deciding state constitutional issues before reaching federal constitutional issues. *State v. Sharf*, 288 Or 451, 605 P2d 690 (1980). The "first things first" principle has since been routinely applied by Oregon's high court. *See, e.g., State v. Acremant*, 338 Or. 302, 321, 108 P.3d 1139, 1151 (2005); *Zockert v. Fanning,* 310 Or. 514, 520, 800 P.2d 773, 776-77 (1990); *Planned Parenthood Ass'n v. Dep't of Human Res.,* 297 Or. 562, 654, 697 P.2d 785, 787 (1984). When this case was first before the Oregon court, the analytical rule was thus well-established. *See Li v. State*, 338 Or. 376, 391, 110 P.2d 91, 99 (2005); *State v. Moore*, 334 Or. 328, 336, 49 P.3d 785, 790 (2002); *State v. Joslin*, 332 Or. 373, 380, P.3d 1112, 1116 (2001) (all applying rule). So were its limited exceptions. *Stevens v. City of Cannon Beach,* 317 Or. 131, 135 n.5, 854 P.2d 449, 451 n.5 (1993), *cert. den.,* 510 U.S. 1207 (1994) (when a party's failure to articulate an independent state-law argument led the court to "assume" the

constitutional analyses would be the same at both the state and federal levels); *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 468 n.6, 900 P.2d 495, 501 n.6 (1995), *cert. den. sub. nom., Oregon PUC v. GTE Northwest*, 517 U.S. 1155 (1996) (same); *State v. Harberts*, 331 Or. 72, 81, 11 P.3d 641, 647 (2000) (where unique circumstances lead the court to deliberately depart from the doctrine for prudential reasons) *State v. Ivory*, 278 Or. 499, 503, 654 P.2d 1039, 1041 (1977) (relying on same principle).

The well-established priority of state issues suggests that, when the Oregon Supreme Court decided the federal question in its initial opinion, the court did not think that it should apply the "correct in all respects" rule. *Only* when this Court rejected the court's view of due process did the court choose to apply its "first things first" rule on analytical priority, and then to apply its "correct in all respects" rule on jury instructions. *Williams*, 344 Or. at 55, 176 P3d. at 1260. The belated application of these rules was never explained. The tardy discovery of these rules is an irregularity requiring this Court to scrutinize carefully whether the decision on remand truly rests on adequate state grounds.

### c. Limited Purpose of the "Correct in All Respects" Rule

The "correct in all respects" rule for instructions has been part of Oregon law for at least 90 years. *Sorenson v. Kribs,* 82 Or. 130, 147, 161 P.

405, 411 (1916). The limited purpose of the rule is to promote judicial economy. It spares trial judges the task of drafting or editing jury instructions. The rationale for the rule has always been that "[t]he trial court cannot be required to edit requested instructions and to omit parts that are incorrect or inapplicable." *Beglau v. Albertus*, 272 Or. 170, 179, 536 P.2d 1251, 1256 (1975) (citing *Brigham v. Southern Pacific Co.*, 237 Or. 120, 124, 390 P.2d 669, 671 (1974)).

Before its latest opinion, the Oregon Supreme Court had never regularly interposed the "correct in all respects" rule when a trial judge, abandoning the passive model, reviewed each subpart of a requested instruction, and decided to draft a collaborative instruction with the participation of the parties paragraph by paragraph. Neither had the court regularly used the rule to permit a verdict to stand when the jury was not properly instructed on the law – certainly not when the jury was instructed inconsistently with the federal constitution. *Cf. NAACP*, 377 U.S. at 297 (when seeming noncompliance with state rule was more a matter of style than substance, the rule's application was "pointless severity").

None of the three cases relied on by the Oregon Supreme Court show that the "correct in all respects" rule is firmly established and regularly followed in such circumstances. *See Hernandez v. Barbo Machinery Co.,* 327 Or. 99, 957 P.2d 147 (1998) (court

reversed and remanded for a new trial for failure to give a requested instruction that was *not* correct in all respects); *Beglau v. Albertus*, 272 Or. 170, 536 P.2d 1251 (1975) (trial court had not abused its discretion to grant a new trial upon concluding that the jury should have been instructed on particular subject about the use of headlights); *Owings v. Rose*, 262 Or 247, 497 P2d 1183 (1972) (court applied the "correct in all respects" rule to avoid reversal of a judgment that was based on the verdict of a correctly informed jury). While each of the three cases contains a discussion of the "correct in all respects" rule, the court reversed two of the cases for a new trial notwithstanding the rule. In the third case, the court applied the rule in service of the goal of correctly informing juries about the law. None of the cases applied the rule to affirm a verdict that was the product of a misinformed jury.

In summary, the purpose of the "correct in all respect" rule is pragmatic and limited. The application of the rule has never been severe or pointless. Before this case, the rule had neither been firmly established nor regularly applied in the circumstances of this case.

#### d. Conflict with Precedent – *State v. George*

As employed here, the "correct in all respects" rule cannot be reconciled with the precedent most applicable to these facts. In *State* v. *George*, 337 Or.

329, 97 P.3d 656 (2004), the Oregon Supreme Court held that where a judge rejects a proposed instruction and concludes that the jury should not be instructed on the subject at all — because the judge disagrees with the legal proposition, not the wording of the instruction— there is no need to submit a revised instruction. The court explained that "[o]ur requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures." *Id.* at 339, 97 P.3d at 661-62.[2]

Since the trial judge had specifically decided that the "harm to non-parties" instruction was a point of law on which the judge would not instruct – no matter what the wording – *George* became the controlling precedent. So, just as in *George*, it would have been a futile gesture for Philip Morris's counsel to redraft Instruction No. 34 or to separate the instruction's disputed paragraph (1) from its other paragraphs. *Cf. Lee*, 534 U.S. at 375-76 (to have made a written, rather than a verbal, motion would have been a futile formality).

Oddly, the Oregon Supreme Court never mentioned *George* in its opinion. Yet, the court was well aware of the case, a fact made clear by colloquy

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[2] This court recognized the same proposition in *Osborne,* 495 U.S. 103, ruling that a party has no duty to ask for a jury instruction on a point of law that the trial court has already rejected. *Id.* at 124.

during oral argument between Philip Morris's counsel and the justice who penned *George and* who later would write the court's opinion on remand. The transcript reveals:

> MR. GARY: The Court—the Supreme Court will defer to state court procedural rules, so long as the rules are consistently applied, and so long as they serve a legitimate state purpose. I think that's exactly consistent with what this court has said in its own preservation rulings; that is, in *George* you recognize the application of the correct-in-all-respects rule would not make any sense in terms of the purposes that preservation is designed to serve –
>
> JUSTICE GILLETTE: Our interpretation as to whether *George* is binding, useful or irrelevant, however, is an interpretation which, given any of those three possibilities, the United States Supreme Court wouldn't care about for one second. That is to say, it assumes that we're proceeding in good faith, and there would be no basis, no matter what way we ruled on* * * *George*, for the Court to assume anything different nor for you to claim anything different, Mr. Gary.

> MR. GARY: I can't really say that I agree with that until I see what the Court has to say. But of course the Supreme Court has presumed that this court acted in good faith, as do we – [.]

(Pet. App. at 180a-181a).

The Oregon high court invoked the "correct in all respects" rule in its decision on remand in the exact circumstance *George* held the rule would not properly apply. Given that fact, that the three authorities relied on by the court are distinguishable, that no prior decision had invoked the rule where a court chose to craft a collaborative instruction "line by line," or where the jury had been misinformed, this Court should conclude that the "correct in all respects" rule had not been regularly and consistently applied by the Oregon Supreme Court in the way it was applied in this case. *Cf. NAACP*, 377 U.S. at 297 (rejecting unusually strict application of state rule). The rule thus cannot be an adequate state ground to avoid the federal question.

#### e. The State Rule As Applied Fails Its Limited Purpose

Whether or not firmly established, the "correct in all respects" rule as applied in this case did not serve any "legitimate state purpose." It is certainly true, as the Oregon Supreme Court observed, that "[i]t is not enough . . . to offer a proposed instruction

that is correct in part and erroneous in part, leaving the trial court to solve the problem for itself." *Williams*, 344 Or. at 56, 176 P.d at 1261 (citation omitted). That criticism presupposes a passive role by the trial judge. That is not what happened here. Although the judge was not required to have drafted an instruction, the judge voluntarily undertook with counsel a deliberative effort to review and edit the proposed competing instructions, paragraph by paragraph. The court thus invited a collaborative process in which "line by line" and "issue by issue" the paragraphs offered were accepted or rejected, one-by-one, and the given instruction was constructed.

Since the purpose of the "correct in all respects" rule is to avoid forcing the judge to draft an instruction, the rule serves no purpose when the judge chooses to draft an instruction. That task which the rule seeks to avoid, the judge voluntarily undertook. The trial court's decision to work collaboratively with counsel made the "correct in all respects" rule irrelevant.

Moreover, the appearance of a series of paragraphs in a single instruction was no added trouble. The trial court was no more burdened by separate paragraphs of an instruction printed on the same page than it would have been if they had been printed on separate pages. Where the judge chooses to draft instructions – rather than simply adopt those the parties submit – it no longer matters if a number

of paragraphs appear under one heading about punitive damages.

When requested instructions appear in separate paragraphs on *different points of law*, when each is argued separately by counsel, and when each is considered separately by the trial court, the "correct in all respects" rule no longer serves a legitimate purpose. *See Douglas v. Alabama*, 380 U.S. 415, 422 (1983) ("an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests"); *Lee*, 534 U.S. at 385 (even a state rule of "undoubted legitimacy" cannot bar consideration of federal rights if the rule has been "substantially met" by the defendant). And, when a state rule serves no legitimate state interest, the rule cannot be used to avoid the federal question. *See NAACP,* 377 U.S. at 297 (state court's insistence on "pointless severity" cannot bar federal rights).

### f. The State Rule's Application Was Too Exorbitant

Finally, the "correct in all respects" rule was too inconsistently applied, too unusually applied, too inappropriate, too senseless, and too "convenient" to be an adequate state ground. Even if the rule might be sound generally or even in other circumstances, its application on these facts was too "exorbitant" to deny Philip Morris its constitutional right to due

process.[3] *See Lee*, 534 U.S. at 385 (explaining when sound state rule is no bar to federal issue in particular case).

## III. CONCLUSION

Like the Oregon *amici*, this Court should be troubled by the Oregon Supreme Court's opinion on remand. The ultimate goal in any case tried to a jury (and the Oregon Supreme Court's constitutional mandate) is to assure that cases are adjudicated by fact finders based on the law the federal constitution

[3] Indeed, that conclusion is fully supported by an analogy to a well-established qualification on a state rule of appellate review. Oregon courts will affirm a trial court if it was "right for the wrong reason" *unless* the aggrieved party might have created a different record below if the prevailing party had raised the new-found reason below. *Outdoor Media Dimensions, Inc. v. State*, 331 Or 634, 659-60, 20 P.3d 180, 195-96 (2001). The qualification could be borrowed and the idea compared in this setting. If plaintiff had objected to the unrelated portions of Instruction No. 34 or complained that separate issues were offered in one instruction, Philip Morris *could easily* have made a different record here by offering the separate issues in separate instructions.

mandates. Oregon's high court lost sight of that goal. It strained to find an "independent and adequate state ground" that left Philip Morris without an assurance of due process this Court recognized was required and in jeopardy of punishment for harm to non-parties.

The application of a state rule that is not firmly established and regularly followed, does not serve any legitimate state interest, and is exorbitant as applied is not an "adequate and independent state ground." The "correct in all respects" rule as applied here cannot properly preclude the constitutional protection this Court directed should have been afforded Philip Morris at trial.

The last time this Court considered this case, concerned Oregon business groups observed that it was "time for the Court to [set] clear standards and clear limits on punitive damages awards that Oregon courts cannot ignore or avoid." This Court did its job. The Oregon Supreme Court did not. The Oregon *amici* respectfully urge this Court to again reverse

and remand to the Oregon court for it to comply fully with the Court's prior decision.

DATED this 20th day of August, 2008.

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